RIA ENTERPRISE & ORS

v.

MBF FINANCE BHD

HIGH COURT MALAYA, KOTA BHARU
MUHAMMAD KAMIL AWANG J
[CIVIL APPEAL NO: MT(1) 12-1-1999]
17 DECEMBER 2000

CIVIL PROCEDURE: *Pleadings - Decision made on issue not pleaded - Whether judgment proper*

CIVIL PROCEDURE: *Counterclaim - Dismissal - Dismissal based on issue not pleaded in pleadings - Whether proper*

CIVIL PROCEDURE: *Damages - Special damages - No proof adduced - Whether recoverable*

The first and second appellants entered into a hire-purchase agreement for the purchase of two vehicles. The third appellant stood as guarantor under the agreement.

Upon default in payment of the instalments due under the agreement, the respondent repossessed the vehicles, sold them and sued the appellants for the balance owing under the agreement.

The appellants alleged that no notice of repossession under the Hire Purchase Act 1967 ('the Act') was given to them and counterclaimed for loss of use and loss of profit.

The trial court found that the vehicles were not included in the Schedule to the Act and held that the Act was therefore not applicable. In consequence judgment was given for the respondent and the counterclaim was dismissed.

On appeal the appellants argued that the trial court had decided on an issue that was not raised in the pleadings.

Held:

[1] The trial court's decision was based on the fact that as the vehicles were not included in the Schedule to the Act, the Act was not applicable. That issue was not raised in the pleadings and it was wrong for the trial court to decide on the issue.

[2] A counterclaim is a separate action independent of the claim of the respondent. In the circumstances, the trial court was again wrong for not hearing the counterclaim on the ground that it was no longer relevant as the Act was not applicable.

[3] The act of repossession by the respondent without prior notice was in contravention of s. 16 of the Act and was unlawful. The appellants were therefore entitled to damages for wrongful repossession of the vehicles by the respondent.

[4] There was no evidence to support the appellants' claim for loss of use and loss of profit. In any event the claim for loss of profit was too remote to contemplate.

[5] The appellants were not entitled to a refund of the advance down payment made at the commencement of the agreement. The said payment was part payment of the purchase price and not a deposit refundable on the occurrence of a breach of the agreement.

[Appeal allowed with costs; appellants awarded nominal damages of RM100.]

Case(s) referred to:
Blay v. Pollard & Morris [1930] 1 KB 628 ***(refd)***
Bonham-Carter v. Hyde Park Hotel [1948] 64 TLR 177 ***(refd)***
Hadmor Productions v. Hamilton [1983] 1 AC 191 ***(refd)***
Hj Mohamed Dom v. Sakiman [1956] 22 MLJ 45 ***(refd)***
Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 ***(foll)***
Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd [1993] 4 CLJ 140 ***(refd)***
John v. Dhamaratnam [1962] MLJ 187 ***(refd)***
Malaysian Rubber Development Corporation Bhd v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 ***(refd)***
Mat Lim v. Anor v. Ho Yut Kam & Anor [1967] 1 MLJ 13 ***(refd)***
Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd [1990] 1 CLJ 133 ***(foll)***
The Chartered Bank v. Yong Chan [1974] 1 MLJ 157 ***(foll)***
Yew Wan Leong v. Lai Kok Chai [1990] 2 CLJ 1113 ***(refd)***

Legislation referred to:
Hire-Purchase Act 1967, s. 16
Rules of the High Court 1980, O. 15 r. 2

Other source(s) referred to:
Mc Gregor on Damages, para 343, p 214
Mayne & Macgregor on Damages, 12th edn, para 970
Principles & Practice, Sir Jack Jacobs & Ian Goldrein, 1990 edn, pp 1-2

For the appellants - Wan Mustapha Hj Ali; M/s Wan Mustapha & Co
For the respondent - Hamdi Omar; M/s Amin Hamdi & Partners

Reported by Satish PS Nair

JUDGMENT

Muhammad Kamil Awang J:

This is an appeal by the appellants against the decision of the learned Sessions Court judge allowing the respondent's claim and dismissing the appellants' counterclaim against the respondent. At the onset of this hearing the respondent's counsel was not present, the case was stood down and the court contacted the counsel's office and was informed that a counsel would attend the court. Having waited patiently for about 40 minutes and there was no sign of the counsel, the court proceeded to hear the appeal at 9.40am without the presence of the counsel for the respondent.

Brief Facts

The 1st and 2nd appellants bought a Mercedes Benz c/w Cargo Trailer No. DU 6697 and TD 585 (hereinafter called 'the vehicles') under a hire-purchase agreement dated 22 December 1998. The price of the vehicles was RM229,000, and under the terms of the hire-purchase agreement, the appellants would pay an advance payment of RM57,000 and the balance to be paid by 47 monthly instalments of RM3,603 each. The 3rd appellant was a guarantor under the hire-purchase agreement.

After eight instalments, the appellants defaulted in the payment of the instalments whereupon the respondent repossessed the vehicles and sold them for RM73,000. Now the respondent brought an action against the appellants to recover the balance of the purchase price at RM75,432.96 at 8% interest daily rests, from 23 October 1997 until the date of realisation.

Learned Sessions Court judge held that the respondent had proved its claim and gave judgment for the respondent. He also held that the appellants' counterclaim was no longer relevant and dismissed it.

Dissatisfied, the appellants filed in an appeal against the decision of the Sessions Court judge on the ground that the learned Sessions Court judge had grievously erred in making a decision on an issue which was not raised in the pleadings.

The importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v. Hamilton* [1983] 1 AC 191, at p. 233:

> Under our adversary system of procedure, for a judge to disregard the rules by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...

Generally, parties are bound by their pleadings and are not allowed to adduce facts which they have not pleaded. Pleadings serve two-fold purpose. First, pleadings inform each party what the case of the opposite party is, which will have to meet before and at the trial. Secondly, pleadings inform the court what the precise matters in issue are between the parties, issues which the court alone may adjudicate. As stated by Scrutton LJ in *Blay v. Pollard & Morris* [1930] 1 KB 628; [1930] All ER Rep. 609:

> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.

Pleadings also constitute a permanent record of the issues and questions raised in the action and decided therein so as to prevent future litigation upon matters already adjudicated upon between the litigants or those privy to them (*Principles & Practice*, Sir Jack Jacobs & Ian Goldrein (eds) 1990 at pp. 1-2).

There is a plethora of authorities on this point. In the Court of Appeal case of *Haji Mohamed Dom v. Sakiman* [1956] 22 MLJ 45, Mathew CJ said, at p. 45:

> I think it is clear that a judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on record, which in this case they were not.

This was adopted by the Federal Court in the case of *The Chartered Bank v. Yong Chan* [1974] 1 MLJ 157, and in that case the respondent brought against the appellant bank for wrongful dishonour of a cheque drawn by the respondent on a partnership account with the appellant bank. Although the act by the appellant gave rise to two possible causes of action, namely, an action for damages for breach of contract and in tort for libel, the case against the bank in the pleadings entirely rested on an allegation of libel. At the trial, it was discovered that the action founded on libel which was statute-barred by virtue of item 11 of the Schedule to the Sabah Limitation Ordinance (Cap. 72). However, the trial judge awarded a sum of RM1,000 by way of damages for breach of contract.

The Federal Court held that the learned trial judge was wrong when he concluded that the pleadings included a claim for breach of contract as well as a claim for libel. Since the trial judge had decided on an issue not raised in the pleadings, the judgment was set aside. See also *Mat bin Lim & Anor v. Ho Yut Kam & Anor* [1967] 1 MLJ 13; and *Yew Wan Leong v. Lai Kok Chai* [1990] 2 CLJ 1113.

In the instant case, the weight of the vehicles exceeded 2040 kilograms (p. 30 Appeal Record) and was not included in the First Schedule, the court ruled that the Hire-Purchase Act 1967 was not applicable to this case. This was never an issue raised in the pleadings. It was wrong for the learned trial judge to decide on an issue not raised in the pleadings. Therefore, the judgment must be set aside, and the appeal was allowed.

The Counterclaim

A counterclaim is a separate action, independent of the claim of the respondent. The trial judge was again wrong for not hearing the counterclaim on the ground that it was no longer relevant in the premise that the Hire-Purchase Act 1967 was not applicable to this case. Order 15 r. 2 of the Rules of the High Court 1980, provides:

> (2) Rule 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action and as if the person making the counterclaim were the plaintiff and the person against whom it is made a defendant.
>
> (3) A counterclaim may be proceeded with notwithstanding that judgment is given to the plaintiff in the action or that the action was stayed, discontinued or dismissed.

On the facts it is quite clear that the respondent had not served on the appellants a notice of the repossession of the vehicles. Thus the act of repossession by the respondent without prior notice was in contravention of s. 16 of the Hire-Purchase Act 1967, and was unlawful. In the circumstances, the appellants had succeeded to prove their case against the respondent. Thus the appellants were entitled to damages for the wrongful repossession of the vehicles by the respondent.

Special Damages

Mc Gregor on Damages, p. 214, para 343:

> A plaintiff claiming damages must prove his case. To justify an award of substantial damages he must satisfy the Court both as to the fact of damage and as to its amount. If he satisfies the Court on neither, his action will fail, or at the most, he will be awarded nominal damages where a right has been infringed.

The obligation to particularise is stated in *Mayne & Macgregor on Damages* 12th edn, para 970:

> Special damages consists in all items of loss which must be specified by (the plaintiff) before they may proved and recovery granted. The basic test whether particularity is necessary or useful to warn the defendant of the type of claim and evidence, and of the specific amount of claim, which he will be confirmed with at the trial.

In *Bonham-Carter v. Hyde Park Hotel* [1948] 64 TLR 177, 178 Lord Goddard said:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying:, 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

This dictum was referred to and applied by the Court of Appeal in *John v. Dharmaratnam* [1962] MLJ 187. And in *Popular Industries Ltd v. Eastern Garment Manufacturing Sdn Bhd* [1990] 1 CLJ 133, the court had occasion to say this (at p. 141):

> It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v. William*). And, where damage is shown but its amount is not proved sufficiently, or at all, the court will usually decree nominal damages. See for example, *Dixon v. Deveridge* and *Twyman v. Knowles*.

In *Malaysian Rubber Development Corporation Bhd v. Glove Seal Sdn Bhd* [1994] 4 CLJ 783, Mohd. Dzaiddin SCF (as he then was) speaking for the Supreme Court, quoted with approval the above passage in *Popular Industries* case *(supra).*

The appellant in the instant case, claimed for special damages for the wrongful repossession of the vehicles by the respondent under three main heads:

(a) the advance down payment of RM57,000;

(b) the loss of use of the vehicles for two years, at RM1,000 per month, ie, RM24,000; and

(c) for loss of profit at RM5,000 per month, ie, RM120,000.

(a) The advance down payment of RM57,000 is not a deposit but it is a part payment towards the purchase price, a term of the agreement. As such it is not a deposit refundable as soon as a breach of the agreement occurs. Thus the advance payment made at the commencement of the agreement is not refundable.

(b) The claim for loss of use of the vehicles for a period of two years, is not supported by evidence. The appellants cannot succeed in this claim without proof of such loss.

In *Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89 the Court of Appeal said, at p. 116:

> When damage is shown but the amount is not proved, the Court will normally award nominal damages. The trial judge was correct in concluding that the loss had not been proved sufficiently by the defendant and was right in giving judgment for RM10 as nominal damages for loss of interest on project investment and loss of income on investment.

See also *Industrial & Agricultural Distribution Sdn Bhd v. Golden Sands Construction Sdn Bhd* [1993] 4 CLJ 140.

(c) Loss of profit at RM5,000 per month for two years, the appellants have failed to adduce any evidence in support thereof. Moreover, the claim for loss of profit is too remote to contemplate. The court will not allow this.

On the evidence as a whole, there is nothing to show losses suffered by the appellants as a result of the wrongful repossession of the vehicles, the court will award the appellants a nominal sum of RM100 for item (b). Costs to the appellants in both actions to be taxed unless agreed.